

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAMESH SAWLANI	:	DETERMINATION
	:	DTA NO. 811357
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1988	:	
through February 28, 1991.	:	

Petitioner, Ramesh Sawlani, 70-45 260th Street, Glen Oaks, New York, 11504, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1989 through February 28, 1991.

Petitioner, appearing pro se, and the Division of Taxation, appearing by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), consented, on February 15, 1994 and February 25, 1994, respectively, to have the controversy determined on submission without hearing (see, 20 NYCRR 3000.8). Documents were submitted by the Division of Taxation by letter dated March 30, 1994 (along with comments on the applicable law) and by petitioner by letter received on April 18, 1994. Briefs were due on June 1, 1994 and July 1, 1994 from the Division of Taxation and petitioner, respectively, but none were filed. After review of the entire record, Nigel G. Wright, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition was premature and invalid because it was filed prior to the order of a conciliation conferee dated November 5, 1993.

FINDINGS OF FACT

(a) A Notice of Determination, numbered L-005374792 and dated March 12, 1992, was issued to petitioner, Ramesh Sawlani, for sales and use taxes due for the period December 1, 1988 through February 28, 1991.

(b) Other notices of determination, which apparently have caused confusion in this

matter, were issued and numbered L-005374790 and L-005374791. Some documents pertaining to those notices were included in the Division of Taxation's ("Division") March 30, 1994 submission.

(a) Petitioner requested, under date of May 25, 1992, the forms to request a conciliation conference. He did this by signing and dating the box printed in the Disagreement with Findings Section of the Division's Form DTF-968. The stamped and postmarked envelope attached thereto is dated May 25, 1992. (This request is referred to, erroneously, in the Division's March 30, 1994 submission as a request for a conciliation conference.)

(b) There is no document in this record indicating when petitioner requested a conciliation conference on notice L-005374792, but it is clear that he did make such a request because a conference was finally held. (A conciliation default order, CMS No. 129025 dated November 5, 1993, was issued with respect to assessment number L005374792). The Division's answer does not deny the fact of such a request.

A Conciliation Order, CMS No. 124388, was issued on August 28, 1992 stating that a request for conference was not received until July 6, 1992. This order, however, was issued with respect to notice number L-005374790, which is not in issue here.

A petition to the Division of Tax Appeals was filed on November 2, 1992 referring to assessment number L-005374792. This was acknowledged as being in proper form by letter of November 25, 1992 from the Division of Tax Appeals.

The answer of the Division was filed on February 16, 1993. This (erroneously) refers to the Conciliation Order, CMS No. 124388, which had found that the request for conference with respect to Notice No. L005374790 was untimely, and accordingly alleges that the request for conference was not received until July 6, 1992 (see, Finding of Fact "3") and therefore was late.

A conciliation conference was held by the Bureau of Conciliation and Mediation Services on October 14, 1993. The order of the conciliation conferee (CMS No. 129025), dated November 5, 1993, sustained the notice of determination and dismissed the request. The reason recited was the failure of petitioner to appear. No other reason was given.

(a) On January 3, 1994, petitioner was sent a notice of hearing by the Division of Tax Appeals of a hearing to be held on February 10, 1994.

(b) Also on January 3, 1994, petitioner was notified that since timeliness had been raised as an issue by the answer of the Division of Taxation, the scheduled hearing would be confined to the timeliness issue.

(c) Thereafter, the parties consented to have the controversy determined on submission. The documents submitted by petitioner relate to the merits of this controversy and have not been considered in this determination. The documents submitted by the Division relate solely to timeliness.

CONCLUSIONS OF LAW

A. Any issue, as raised by the answer, of whether the petition was late with respect to the order of the conciliation conferee dated August 28, 1992 (see, Tax Law §§ 2006[4]; 170[3-a][b]) must be considered ineffective as the answer clearly refers to the wrong Conciliation Order. Additionally, the Division has not shown the date of any other Conciliation Order issued prior to the petition (nor denied that there was one) and the burden of proof on the mailing of a Conciliation Order is on the Division (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989). The issue of whether the petition of November 2, 1992 was premature (see, Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990) because it was made prior to the November 5, 1993 Conciliation Order was raised only after the submission of documents to the Division of Tax Appeals. In any event, it is academic. Reduced to the essential facts, a notice of determination was issued followed (rather tardily) by a conciliation conference. The order of the conferee sustained the determination and dismissed the request upon the default of petitioner. This order was dated November 5, 1993. (There is no evidence in the record as to when this order was mailed.) In any event, the Conciliation Order is not binding if the taxpayer, within 90 days, petitions the Division of Tax Appeals for a hearing (Tax Law § 170[3-a][e]) and, in this case, the 90-day period would not expire prior to February 3, 1994. Prior to the expiration of the time to appeal, petitioner received the notice of hearing from the Division of

Tax Appeals with respect to his already filed petition. Any issue of a premature petition had not been raised at that time. Petitioner had every right to think that his prior petition was valid and was still pending or at least that there was no need of an additional petition.

B. The petition of Ramesh Sawlani is granted to the extent that the matter will be scheduled for a hearing or a submission of documents on the merits.

DATED: Troy, New York
September 22, 1994

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE